U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JAN 9 1989
CASE NO. 88-INA-123

IN THE MATTER OF

SIZZLER RESTAURANTS INTERNATIONAL,
Employer

on behalf of

HSUAN CINDY HSIAO,
Alien

George O. Feldman, Esq.
Beverly Hills, CA
For the Employer

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge, and Brenner, DeGregorio, Tureck, Guill and Schoenfeld
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States

[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On January 9, 1987, the Employer, a restaurant chain, filed an application for alien employment certification (AF 13-41) to enable the Alien to fill the position of Financial Analyst in its corporate headquarters in Los Angeles. An M.S. degree in accounting "or related skills", with one year of experience, were required (AF 13). Special requirements consisted of competence in automated financial analysis (using professional "db" programs), and good communications skills.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on April 24, 1987 (AF 9-11), and the Employer's filing of its rebuttal on June 4, 1987 (AF 4-6), the Final Determination denying certification was issued on July 27, 1987 (AF 2-3).

Discussion

The substantive portion of the NOF in this case consisted of a form listing various possible violations of the regulations. Two of these possible violations were checked off. The first check mark was next to a paragraph stating that: U.S. applicants appear to have met the minimum requirements for the job; that employer has not demonstrated that "the applicant[s] listed below" cannot perform the job; and that employer's reasons [the form does not identify which reasons] are subjective and unsubstantiated. Rhae Meredith Gleaton is the only applicant "listed below" (see AF 10-11). The other check mark is next to a statement that "[t]he employer must demonstrate a good faith effort to contact and consider all U.S. applicants for the job opportunity:" (AF 11). It is obvious from the colon following "job opportunity" that a further explanation of this alleged violation is contemplated. In fact, the form lists several more specific possible violations following the general language quoted above, with blank lines for the CO to provide information pertinent to the case at hand. But no other boxes are checked or information provided.[2]

---

[2] The Board notes that the controversy in this case arises from the use by the CO of (continued...)

Employer's rebuttal to the NOF was directed solely to the point that the applicant, Rhae Meredith Gleaton, could not be contacted. Employer noted that the applicant's phone was disconnected when it first attempted to contact her in October, 1986, which is consistent with the information it presented to the State Employment Development Department ("EDD") in January, 1987 following its initial recruitment (see AF 22-23). This letter to the EDD, which is part of the Appeal File, was written four months before the NOF was issued.

The Final Determination denied certification on two grounds. First, the CO continued to find that Employer failed to establish that the applicant was unqualified for the job. Second, citing Employer's efforts to contact the applicant following the issuance of the NOF, the CO found that these efforts lacked good faith (AF 3).

In a Notice of Findings, an employer is entitled to a clear statement of the deficiencies found by the CO in its advertising and recruitment. Otherwise, the employer cannot file a responsive rebuttal or cure the deficiencies. The NOF in this case did not meet this straight-forward test in regard to the unavailability of the applicant. Rather, the CO offered no explanation at all of why the Employer's inability to contact the applicant was not a good-faith effort; nor did he otherwise indicate what Employer did wrong. Since Employer stated that it had attempted to contact the applicant, only to find that her phone was disconnected, the CO had an obligation to discuss this effort at contacting the applicant. Instead, there is no indication either in the NOF or the Final Determination that the CO was aware that this attempt was made, even though it was discussed again in Employer's rebuttal to the NOF.

Since Employer provided a reasonable explanation of why it could not contact the applicant, and the CO failed to indicate why this effort lacked good faith, his denial of certification must be reversed.[3] That the applicant may have been qualified for the job is irrelevant since she was unavailable.

---

[2](...continued)
a form listing many potential violations of the Act and the regulations in the Notice of Findings. As is clear from the decision in this case, such forms often lead to inadequate notice of the alleged violations, due to their lack of specificity and failure to address the facts of the application being considered. In addition, such form notices are often confusing, precluding effective rebuttal. Similar confusion may arise from the use of large blocks of general boilerplate language regarding substantive allegations in Notices of Findings.

[3] This decision should not be construed as holding that a telephone call to an applicant is all that can ever be required of an employer. However, based on the facts of this case, where the only contention by the CO was an unexplained charge that Employer failed to act in good faith, employer's telephone call to the applicant establishing that her telephone had been disconnected was sufficient.

ORDER

The Certifying Officer's denial of alien labor certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge